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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

HOWARD ALAN ZOCHLINSKI, Plaintiff and Appellant, v. CALVIN HANDY et al., Defendants and Respondents.	C036429 (Super. Ct. No. CV9371626)

Plaintiff Howard Alan Zochlinski, in propria persona, appeals from the dismissal of this action by the trial court for failure to bring the action to trial within five years of commencing the action as to defendant Sally Yau (Code Civ. Proc., § 583.310), and within three years after the remittitur was filed as to the remaining defendants. (Code Civ. Proc., § 583.320, subd. (a)(3).)[1]

We conclude that section 583.320, subdivision (b), which states no action is required to be brought to trial before the

[1] References to a section are to the Code of Civil Procedure.

expiration of five years from commencement, is controlling. Although the trial court may in its discretion dismiss an action prior to the expiration of five years from commencement under sections 583.410 through 583.430, it did not do so. Therefore, we must reverse as to the U.C. defendants, with directions to the trial court that if it intends to dismiss under its discretionary powers, it must make its intention clear. We shall, however, affirm the judgment of dismissal as to defendant Yau.

FACTUAL AND PROCEDURAL BACKGROUND

In 1992 Sally Yau complained to John Jones, a University of California (U.C.) at Davis Police Officer, that Zochlinski was stalking her. Jones and Patricia Fong, a Yolo County Assistant District Attorney, secured the issuance of an arrest warrant for Zochlinski. Jones arrested Zochlinski, but on the morning of the date set for the trial, the charge was dismissed.

Zochlinski filed a complaint naming, inter alia, Yau, Jones and others claimed derivatively liable for Jones's conduct (collectively U.C. Davis), and Fong and others claimed derivatively liable for her conduct (collectively the County). The defendants demurred to the complaint. The trial court sustained without leave to amend the demurrers of U.C. Davis and the County. The trial court sustained the demurrer of Yau with leave to amend.

Zochlinski appealed from the subsequent dismissals of U.C. Davis and the County on March 9, 1995. We affirmed the judgment dismissing the case against County and the Board of Regents of

U.C., but reversed as to the other U.C. Davis defendants. The remittitur was filed by the clerk of the trial court on April 21, 1997.

Meanwhile, Zochlinski filed a second amended complaint. Yau again demurred. The trial court overruled her demurrer as to the cause of action for malicious prosecution. The court sustained Yau's demurrer with leave to amend as to other causes of action on the ground Zochlinski failed to allege specific facts in support of those causes of action.

On May 2, 2000, the trial court moved sua sponte to dismiss the action under section 583.360.[2] On June 28, 2000, the trial court entered its order dismissing the action against Yau pursuant to section 583.310,[3] and against the remaining defendants pursuant to section 583.320.[4]

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[2] Section 583.360 provides: "(a) An action shall be dismissed by the court on its own motion or on motion of the defendant, after notice to the parties, if the action is not brought to trial within the time prescribed in this article. [¶] (b) The requirements of this article are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute."

[3] Section 583.310 provides: "An action shall be brought to trial within five years after the action is commenced against the defendant."

[4] Section 583.320, provides in pertinent part: "(a) If a new trial is granted in the action the action shall again be brought to trial within the following times: . . . [¶] (3) If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, within three years after the remittitur is filed by the clerk of the trial court. [¶] (b) Nothing in this section requires that an action

DISCUSSION

I

Judgment in Favor of the U.C. Defendants

Zochlinski correctly argues that the court improperly dismissed the case against the U.C. Davis defendants for failure to bring the case to trial within three years of the remittitur, because the five-year period had not expired since the action was filed.

Zochlinski filed the action on November 19, 1993. The trial court moved to dismiss the case on May 2, 2000. This covers a period of approximately six years and six and one-half months. The case was on appeal to this court for approximately two years and one month, from March 9, 1995, when the appeal was filed, to April 21, 1997, when the remittitur was filed. The time elapsed after the remittitur was just over three years.

Section 583.320, subdivision (b) specifies that the three-year limitation placed upon bringing an action to trial after the filing of the remittitur following reversal on appeal and remand for a new trial shall not require the dismissal of an action prior to the expiration of the five-year period from the date of the original filing of the complaint, as provided in section 583.310. (*Bergin v. Portman* (1983) 141 Cal.App.3d 23, 26.) In other words, the passing of three years from remittitur is insufficient to invoke the mandatory dismissal provisions of

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again be brought to trial before expiration of the time prescribed in Section 583.310."

section 583.320, subdivision (a)(3) if less than five years has expired from the date the plaintiff commenced the action.

In this case approximately six and one-half years had elapsed since Zochlinski filed his original complaint. However, section 583.340 provides that in computing the time within which an action must be brought to trial, the time during which the jurisdiction of the court to try the action was suspended must be excluded. Accordingly, the time during which the jurisdiction of the trial court is suspended because the cause is removed to the appellate court is not counted as part of the five-year period. (*Bergin v. Portman, supra,* 141 Cal.App.3d at p. 26*; Christin v. Superior Court* (1937) 9 Cal.2d 526, 530.) Since the case was on appeal approximately two years, about six months was still remaining of the five-year period mandated by section 583.310.

Bergin v. Portman, supra, 141 Cal.App.3d 23, is directly on point. There, the defendant successfully appealed a summary judgment entered in the plaintiff's favor. The defendant moved to dismiss the action approximately three years and three months after the remittitur was filed pursuant to section 583, subdivisions (b) and (c) (now sections 583.310 and 583.320). (*Id.* at p. 25.) The trial court entered judgment dismissing the action under section 583, subdivision (c) (now section 583.320). (*Ibid*.) The court of appeal reversed, concluding the three-year limitation on bringing an action to trial after the filing of the remittitur did not require dismissal of the action prior to the expiration of the overall five-year period from the date the

complaint was filed, and further concluding the time during which the court's jurisdiction to try the action was suspended because of the appeal must be excluded from the overall five-year period. (*Id*. at p. 26.)

The U.C. Davis defendants argue the trial court nevertheless had the power to dismiss the case in its discretion pursuant to section 583.410, subdivision (a) for delay in prosecution. In support of their argument, they cite ***Blue Chip Enterprises, Inc. v. Brentwood Savings & Loan Assn.*** (1977) 71 Cal.App.3d 706.

Blue Chip Enterprises, Inc. is distinguishable, as explained in ***Bergin v. Portman, supra,*** 141 Cal.App.3d at page 27, in which the defendant raised the same argument. The ***Bergin*** court rejected the argument, stating: "In the present case, unlike the situation in ***Blue Chip Enterprises,*** the record shows that dismissal was based exclusively on section 583 without reference to any 'independent basis' for the ruling. There is no indication that the trial court exercised its discretion in dismissing the action, . . . '"If a ruling which might have been made as a matter of discretion is based entirely upon other grounds, the appellate court will not consider whether the ruling would constitute a proper exercise of the discretionary power."' (***People v. Union Machine Co***. (1955) 133 Cal.App.2d 167, 171 [284 P.2d 72].)" (***Bergin v. Portman, supra,*** at pp. 27-28.)

Here, the trial court indicated its ruling was based solely on the mandatory dismissal provision of section 583.320, with no

reference to its discretionary power to dismiss under section 583.410. If the trial court intends its dismissal to be pursuant to its discretionary powers, it must so indicate.

II

Judgment in Favor of Yau

The judgment in favor of defendant Yau stands on a different footing. Yau was not a party to the prior appeal, thus the five-year time period within which to bring her case to trial was not tolled by the appeal of the other defendants. The trial court recognized this when it dismissed her case pursuant to section 583.310, the five-year time limit.

This court has stated that a plaintiff is not relieved from proceeding against one defendant merely because an action could not be brought to trial against another defendant. (*Arnold v. State of California* (1969) 273 Cal.App.2d 575, 585; see also *Fisher v. Superior Court* (1958) 157 Cal.App.2d 126, 130; *Ellsworth v. United States Metals Corp.* (1952) 110 Cal.App.2d 727, 730.) If a plaintiff fails to proceed against a defendant who is not involved in plaintiff's appeal, such defendant may properly seek dismissal of the action for failure to prosecute. (*Arnold v. State of California*, *supra*, at p. 585.)

Zochlinski nevertheless argues his claims against Yau present an exception to section 583.310 because it would have been impossible, impracticable and futile for him to proceed against her in an action separate from the proceeding against the U.C. defendants. Section 583.340, subdivision (c) specifies that in computing the time in which an action must be brought to

trial, we must exclude any period in which bringing the action to trial would have been impossible, impracticable or futile.

As a threshold matter, we must determine whether Zochlinski could have severed his causes of action and proceeded separately against Yau. (*Brunzell Const. Co. v. Wagner* (1970) 2 Cal.3d 545, 553.) The only viable cause of action that remained against Yau was one for malicious prosecution. The trial court overruled Yau's demurrer only on this cause of action. The demurrer as to the other causes of action against Yau were sustained with leave to amend. Zochlinski never amended his pleading. The discretion of a trial court to sever a party's causes of action is broad. "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, . . . or of any separate issue or of any number of causes of action or issues . . . ." (§ 1048, subd. (b).) It does not appear that Yau and the U.C. defendants have a unity of interest or claim. They have separate adverse interests. Therefore, the action against Yau could have been severed.

Zochlinski had the burden of proving the existence of impossibility, impracticability or futility of bringing the action against Yau to trial within five years. (*Bank of America v. Superior Court* (1988) 200 Cal.App.3d 1000, 1014.) We may assume the trial court found that he failed to do this. On appeal Zochlinski claims he was unable to proceed to trial because he was ill, because he was under duress, and because

fraud was committed against him. None of these claims of fact are supported by a citation to evidence in the record.[5] We may assume that Zochlinski pointed out all evidence favorable to his contentions on appeal, and we need not make an independent inspection of the record to determine whether his contentions are supported by evidence. (*Steele v. Litton Industries, Inc*. (1968) 260 Cal.App.2d 157, 170.) As Zochlinski has cited no evidence, we may assume there was none; therefore, the trial court did not err in concluding Zochlinski could have proceeded to trial against Yau separately.

Zochlinski also claims he is entitled to have his case governed by federal procedural rules because he asserts federal civil rights claims against the defendants. He argues the trial court erred in dismissing the case under state mandatory dismissal statutes. He claims the court should have been bound by federal procedural rules, which provide only discretionary dismissal for lack of prosecution. He is incorrect.

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[5] The sole piece of "evidence" Zochlinski makes reference to in his opening brief is to an unsigned, unsworn letter from a "Mental Health Clinician" who claimed to have counseled Zochlinski during approximately May 1999 to May 2000. The letter states, "his attempts [to act as his own counsel] have been delayed from time to time by fairly severe Clinical Depression, which was not effectively medicated from 1992 until 1997." If the trial court considered this letter, we may assume the court determined the letter did not meet defendant's burden of showing he was unable to proceed with the case due to illness. However, the court need not have considered the letter at all, as it was unsigned and unsworn.

As a preliminary matter, the only cause of action properly asserted against Yau was a state claim for malicious prosecution.

Furthermore, "[t]he general rule is that when a federal cause of action is pursued in a state court, state law is controlling with respect to matters of practice and procedure, in the absence of any contrary provision in the federal statute." (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1229, fn. 6.) No contrary provisions exist in the statutes asserted in Zochlinski's second amended complaint. The federal supremacy clause merely prohibits a state court from applying a state law that is inconsistent with federal law. (*County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 298.) "Neutral state procedural rules of court administration not affecting the ultimate outcome of the controversy are not preempted by federal law. (See *Johnson v. Fankell* [(1997)] 520 U.S. 911, 918-921 [117 S.Ct. 1800, 1804-1806, 138 L.Ed.2d 108]; *Felder v. Casey* [(1988)] 487 U.S. 131, 138 [108 S.Ct. 2302, 2306-2307, 101 L.Ed.2d 123].) But state law that would produce a different outcome in state than in federal court must yield to federal law. Only then does federal preemption prevent a state court from applying state law in a federal civil rights case brought in state court. (*Felder v. Casey, supra*, at p. 138 [108 S.Ct. at pp. 2306-2307].)" (*Id*. at p. 300.)

A mandatory five-year limitation in which to bring a case to trial is a neutral procedural rule of court administration. It is not outcome determinative in the sense that it is so

hostile to a plaintiff's rights that it would "'frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court.'" (*County of Los Angeles v. Superior Court, supra,* 21 Cal.4th at p. 299.) Zochlinski cannot therefore claim the action should not have been dismissed against Yau on this ground.

Zochlinski also claims the trial court erred when it failed to grant his motion to vacate the judgment of dismissal on the grounds of mistake, inadvertence, surprise or excusable neglect (§ 473, subd. (b)), and when it failed to grant a new trial. (§ 657.) Zochlinski fails to point to any facts in the record indicating he made a motion for a new trial.

"It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations.]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.) Any claim the court should have granted a new trial is therefore waived.

Zochlinski's argument that the trial court erred in failing to grant his section 473, subdivision (b) motion suffers from the same disability as his argument that the five-year period should have been tolled because of impossibility. The party seeking relief from the judgment bears the burden of showing that he had a satisfactory excuse for allowing a judgment to be

taken against him through his mistake, inadvertence, surprise, or excusable neglect. (*Eigner v. Worthington* (1997) 57 Cal.App.4th 188, 196.) As with his argument against the running of the five-year dismissal statute, Zochlinski fails to point to any evidence in the record to support his claim that his failure to prosecute the matter was excused.

DISPOSITION

The judgment is reversed as to the U.C. defendants. If the trial court desires to enter an order dismissing the action pursuant to its discretionary powers, it must so state. The judgment of dismissal in favor of Yau is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 26(a).)

BLEASE, J.

We concur:

SCOTLAND, P.J.

KOLKEY, J.